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No. 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

UNITED STATES OF AMERICA EX REL. AUDREY M. TOTH,
Petitioner

v.

DONALD A. QUARLES, SECRETARY OF THE UNITED STATES AIR FORCE, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY TO SUPPLEMENTAL MEMORANDUM OF RESPONDENT

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Respondent's Supplemental Memorandum was apparently submitted to answer the query: Who is civilian Toth's commanding officer *to whose authority he is subject* and who can order his arrest or confinement? This question was addressed to the specific meaning of Article 9(c) which provides that "a civilian subject to this code may be ordered into arrest or confinement *only by a commanding officer to whose*

authority he is subject, by an order, oral or written, delivered in person or by another officer. The *authority* to order such persons into arrest or confinement *may not be delegated.*" (Emphasis supplied)

It would appear that respondent's effort, in the supplemental memorandum, to answer this basic question is nothing more than logomachy. Respondent consistently, in a vain effort, to make his point, picks and chooses from parts and portions of Articles 3(a), 7 and 9(c); admitting in one part that Toth has no commanding officer to whose authority he is subject, yet, nevertheless, still asserting that somehow, somewhere there is military authority over him.

Stripped of verbiage respondent's memorandum seeks to elucidate the proposition that (1) the Secretary of the Air Force is a "commanding officer" who could *order* Toth's confinement (Resp. Memo. 16), and (2) that the Commanding General of the Fifth Air Force in Korea actually ordered Toth's confinement on orders of the Secretary of the Air Force (Resp. Memo. 14).[1] More essentially respondent's case is based on the proposition that the Secretary of the Air Force is an appropriate "commanding officer" within the meaning of the Military Code.

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[1] Petitioner was apprized for the first time from the information set forth in the footnote on page 14 of respondent's memorandum that Toth's confinement was *ordered* by the Commanding General of the Fifth Air Force. Needless to say petitioner has never been advised that such order was ever delivered to Toth as is required by the express provisions of Article 9(c). Moreover, the fact that a written order was made does not establish *authority* to issue the order. To argue otherwise, as respondent attempts to do, is sheer sophistry.

I

The fallacy of respondent's basic premise is easily and quickly demonstrated.

First: The Secretary of the Air Force is not a "commanding officer" within the meaning of Article 9(c) because by definition he cannot be classified as an "officer" in the military sense and in the sense in which that word is used in the Uniform Code. Article 1(5) specifically defines the term as follows:

> "'Officer' shall be construed to refer to a *commissioned officer* including a commissioned warrant officer." (Emphasis supplied)

There can be no gainsaying the fact that the Secretary of the Air Force does not fit this definition. The Secretary of the Air Force is not, perforce his appointment to that office, a commissioned officer of the Air Force.

Second: Respondent would seek to argue that the Secretary is a commanding officer as specified in Article 9(c), because he fits the definition of "commanding officer" as that term is defined in paragraph 21(a) of the *Manual for Courts-Martial, United States* (Cf. Pet. Br. 39, fn. 8). Respondent argues that the Secretary fits this definition because he is an "officer commanding or in charge of any other command who, under Article 24, has the power to appoint a summary court-martial". Respondent disregards completely the fact that "officer" has been defined otherwise in the Code (Article 1(5)) and likewise disregards completely the fact that when considered in context "commanding officer" as used in paragraph 21(a) of the *Manual* means an officer who is in command of troops or "other place

where members of the armed forces are on duty". Likewise, critical analysis of paragraph 21(a) of the *Manual* and Articles 22, 23 and 24 of the Code demonstrates that the "commanding officer" referred to in paragraph 21(a) of the *Manual* does not refer to the President or the Secretary of a Department, but refers to "commanding officers" as specifically listed in Article 22(a)(3) through (7), Article 23(b)(2) through (7) and Article 24(a)(2) through (4).

Third: The most baseless argument which respondent presents is that the Secretary of the Air Force is a "commanding officer" within the meaning of Article 9(c) because ". . . the Secretary's command is, of course, the entire Air Force". (Resp. Memo. 16, footnote)

Section 626, Title 10, U.S.C. specifically provides that the Secretary of the Air Force shall be appointed from *civilian life* by the President. This civilian Secretary is the head of the Department of the Air Force but he is not in command of the United States Air Force. The officer in command of the United States Air Force is the Chief of Staff of the United States Air Force, a commissioned officer. Compare 10 U.S.C. 626 and 10 U.S.C. 626(c). This point need not be labored. The difference between the Secretary as the *civilian head* and the Chief of Staff as the *commanding officer* of the Air Force is ineluctably demonstrated by examination of Section 626-1(c) of Title 10, U.S.C. which provides:

> "If the Chief of Staff, by reason of succession assumes, or if he or any other officer of the Air Force is designated in accordance with Section 6 of this title, to perform the duties of the Secretary of the Air Force, Section 576 of Title 10 shall not apply

to him by reason of his temporarily performing such duties."[2]

Petitioner notes respondent's assertion that "It would come as a stunning surprise to those in the Air Force to learn that a lieutenant commanding an 'auxiliary airfield' has a power to order arrest or confinement which is denied to the Secretary."[3] (Resp. Memo. 16, footnote) The short and complete answer to this assertion is that the surprise, if surprise there be, arises not from any suggestion of petitioner, but arises by virtue of Congressional legislation. The Congress and not petitioner has the power "To make rules for the government and regulation of the land and naval forces." The Congress has made it definite and clear that the Secretary is not a commanding officer.

II

While respondent asserts that Toth was "ordered" into confinement by the Commanding General of the Fifth Air Force, he nevertheless recognizes that such Commanding General had no power, jurisdiction or authority to order such confinement unless such authority was conferred or given by a higher authority in the hierarchy of command. (Resp. Memo. 13-14) It is apparently conceded by the respondent that the

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[2] 10 U.S.C. § 576 provides: "No officer of the Army on the Active list shall hold any civil office, whether by election or appointment and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the Army and his commission shall be thereby vacated".

[3] *Quaeritur:* Would it likewise "come as a stunning surprise to those in the Air Force to learn "that the Fifth Amendment guarantees the civilian citizen the right of indictment by grand jury and the concomitant rights of a trial by petty jury, bail, etc., when accused of a crime?

Commanding General of the Fifth Air Force was not Toth's commanding officer who could, without more, order his confinement under Article 9(c). Whatever authority this officer had over Toth must, according to respondent's argument, be derived from authority conferred by a higher source, namely, the civilian head of the Department of the Air Force.

Since the civilian Secretary is demonstrably proven not to be a "commanding officer" and, more importantly, not the commanding officer of a civilian who had absolutely no connection with the military, respondent's major premise collapses. If the civilian Secretary did not himself have authority to order the confinement, he cannot confer the authority. *Nemo dat qui non habet.*

Furthermore, Article 9(c) provides that the authority to order confinement may not be delegated. Yet respondent's *reductio ad absurdum* is to argue delegation of this non-delegable authority merely to effectuate confinement.

III

Petitioner recognizes full well that the basic issue presented by this case is whether or not the Congress may, without violating the Constitution, enact the legislation which is under consideration herein. But this basic issue cannot be considered in a vacuum. It is important to recognize that the end object of the legislation is to deprive the civilian citizen of the basic rights guaranteed him by the Fifth and Sixth Amendments. Critical analysis of the provisions of the Uniform Code is pertinent to the basic constitutional question inasmuch as such analysis demonstrates the vagueness and indefiniteness of the legislation which is

sought to be used as a vehicle for making *military justice* superior and paramount to civil authority.

To put the importance of the analysis of the provisions of the Uniform Code in another way, perhaps, had the Congress addressed itself to the proposition of filling in the details of authority of the military to court-martial civilians it would have become appreciative of the basic invalidity of its effort.

Respectfully submitted,

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